



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: JULY 01, 2022

IN THE MATTER OF:

Appeal Board No. 621741

PRESENT: RANDALL T. DOUGLAS, MEMBER

The Department of Labor issued the initial determinations disqualifying the claimant from receiving benefits, effective October 14, 2021, on the basis that the claimant voluntarily separated from employment without good cause; or, in the alternative, disqualifying the claimant from receiving benefits, effective

October 14, 2021, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to October 14, 2021 cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances on behalf of the claimant and the employer. By decision filed February 17, 2022 (), the Administrative Law Judge sustained the initial determination of misconduct and held the initial determination of voluntary quit without good cause to be academic.

The claimant appealed the Judge's decision to the Appeal Board.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant was employed as the full-time Director of Patient Services by a visiting nurse service, from February 16, 2021, through

October 13, 2021. In the Summer of 2021, the employer notified all employees that they were required to have one dose of the COVID19 vaccine by October 7, 2021, pursuant to a New York State Department of Health mandate.

On September 28, 2021, the claimant requested a religious exemption because she objected to the vaccines as she had read fetal cell lines were used in their production and testing. The claimant is a Catholic. The employer denied her religious exemption request that day advising her that the Pope had said it was alright to get the vaccine. The claimant made a second request for a religious exemption. The employer asked the claimant for proof there were fetal cells in the vaccine.

On October 18, 2021, the employer denied the claimant's second request for a religious exemption because she had not provided proof there were fetal cells in the vaccine. The employer told the claimant that she had to provide proof of receipt of a first vaccine dose by 11:59 pm on October 18, 2021 or it would proceed to the termination of her employment. The claimant did not receive the vaccine and the employer ended her employment.

OPINION: The credible evidence establishes that the claimant's employment ended on October 18, 2021, because she refused to get the COVID19 vaccine. The claimant was aware of the employer's requirement and that she could not continue her employment if she did not comply. We therefore conclude that the claimant provoked her own discharge. A provoked discharge occurs when a claimant voluntarily violates a legitimate known obligation, leaving the employer no choice but to discharge her. A provoked discharge is considered a voluntary leaving of employment without good cause for unemployment insurance purposes and subjects a claimant to a disqualification from receiving benefits (see, *Matter of DeGrego*, 39 NY2d 180 [3d Dept. 1976]).

Significantly, the employer's vaccine requirement was established for the purpose of complying with New York State's mandate that all healthcare workers be vaccinated against COVID-19 during the pandemic. The Courts have long held that New York State has the authority to regulate public health, including mandating vaccination to curb the spread of disease (see *Matter of Garcia v. New York City Dept. of Health & Mental Hygiene*, 31 NY3d 601 [2018], which upheld mandated annual influenza vaccinations for children attending childcare programs in New York City; *Matter of C.F. v. New York City Dept of Health & Mental Hygiene*, 191 AD3d 52 [2d Dept 2020], holding that a municipal agency had the authority to require immunizations of adults in an area where there

was an outbreak of measles if authorized by law; and *Matter of New York City Mun. Labor Comm. v. City of New York*, 73 Misc.3d 621 [Sup. Ct. N.Y. Cnty. 2021], where the Court declined to grant a temporary restraining order of the implementation of the New York City Department of Education's COVID19 vaccine mandate for its employees, noting that there was no dispute that the Department of Health and Mental Hygiene had the authority to issue the mandate and that the Court "...cannot and will not substitute [others'] judgment for that of New York City's public health experts," citing *New York State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82 v. Cuomo*, 64 NY2d 233, 237-40 [1984]). Due to the severity of the ongoing COVID19 crisis and healthcare providers' need to protect the health of their employees and patients, the emergency regulation requiring all healthcare employees to be vaccinated against COVID19 was justified by a compelling governmental interest. Thus, the employer's requirement that the claimant be vaccinated was a legitimate obligation and the employer had no choice but to end the claimant's employment when she refused to meet it.

Further, regarding the claimant's contention that her refusal to vaccinate was based on religious concerns, it is noted she sought, and was denied, an exemption. The Supreme Court of the United States has held that "... an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate" (see *Employment Div. v. Smith*, 494 US 872, 879 [1990]). The Court determined that provided a law is neutral and not aimed at a specific religion, is generally applicable, and pertains to an area of law the government has the ability to regulate, it cannot be preempted by a religious practice. In this matter, there is no allegation that the state cannot regulate the healthcare industry, that the law is not generally applicable to those in that industry, or that it targeted a specific religion. Further, in *Dr. A et al v. Hochul*, 142 S.Ct. 552 (2021), the Court denied an application for injunctive relief in a challenge to New York State's law removing religious exemptions from its COVID-19 vaccine mandate for hospital workers. Additionally, the Second Circuit in *We the Patriots USA, Inc. v. Hochul* 2021 U.S. App. LEXIS 32921 (2d Cir 2021), upheld New York's COVID19 vaccine mandate for hospital employees without religious exemptions. Therefore, we find that the claimant's personal beliefs do not outweigh the employer's interest in protecting the health and safety of its employees and patients. Accordingly, we conclude that the claimant has not substantiated that she had good cause for ending her continuing employment and she was properly disqualified from receipt of benefits.

The issue of misconduct is rendered academic.

DECISION: The decision of the Administrative Law Judge is modified as follows and, as so modified, is affirmed.

The initial determination, disqualifying the claimant from receiving benefits, effective October 14, 2021, on the basis that the claimant voluntarily separated from employment without good cause, is sustained.

The claimant is denied benefits with respect to the issues decided herein.

RANDALL T. DOUGLAS, MEMBER